SUPREME COURT, U. S.
FILED
JUN 19 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. 260

GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, MOBIL OIL CORPORATION and SINCLAIR REFINING COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent,

and

THE AMERICAN OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE OIL COMPANY and CITIES SERVICE COMPANY,

Respondent-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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June 19, 1969

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Supreme Court of the United States

OCTOBER TERM, 1968

No. _____

GULF OIL CORPORATION,
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MOBIL OIL CORPORATION and
SINCLAIR REFINING COMPANY,
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—against—

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Respondent,

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THE AMERICAN OIL COMPANY,
THE ATLANTIC REFINING COMPANY,
CITIES SERVICE OIL COMPANY and
CITIES SERVICE COMPANY,
Respondent-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners seek a writ of certiorari to review an order of the United States Court of Appeals for the Third Circuit which dismissed the appeals of petitioners. The appeals were taken from an order of the United States District Court for the District of New Jersey which denied petitioners' motion to bar their trial on the ground that to pro-

ceed with such trial would irretrievably deny petitioners their rights under the Double Jeopardy Clause of the Fifth Amendment.

OPINIONS BELOW

The opinion of the District Court (Wortendyke, U.S.D.J.) is reported at 296 F. Supp. 538 and printed as Appendix A, pp. A1-A5, *infra*. The order of the District Court is printed as Appendix B, p. A6, *infra*. The order of the Court of Appeals granting the Government's motion to dismiss the appeals is printed as Appendix C, p. A7, *infra*.

JURISDICTION

The order of the Court of Appeals granting the Government's motion to dismiss the appeals is dated and was filed on May 23, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Double Jeopardy Clause of the Fifth Amendment protect an accused against the hazards and harrassment of a second trial for the same offense or merely warrant reversal of conviction after a second trial for the same offense?

2. If the Double Jeopardy Clause protects an accused against the hazards and harrassment of a second trail for the same offense, is the District Court to be the court of last resort in preserving such protection or is the order of the District Court denying petitioners' motion to bar trial on the ground of double jeopardy to be appealable as a final decision under 28 U.S.C. § 1291?

3. Does deferment of appellate review of an order of a district court denying a motion to bar trial on the ground of double jeopardy deny an accused the full protection of his constitutional rights under the federal judicial system?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the Double Jeopardy Clause of the Fifth Amendment, which provides:

> "No person shall . . . for the same offence . . . be twice put in jeopardy of life or limb;"

The statute involved is 28 U. S. C. § 1291, which provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

On April 8, 1965, petitioners and respondent-defendants were indicted in a three-count indictment. Count I charged all defendants with participating in a conspiracy in violation of Section 1 of the Sherman Act to fix the price of gasoline in the States of New Jersey, Pennsylvania and Delaware from at least as early as 1955 through the return date of the indictment. Counts II and III, respectively, charged four of the defendants with conspiracy to monopolize and an attempt to monopolize in violation of Section 2 of the Sherman Act. Petitioners have pleaded not guilty.

On January 6, 1969, petitioners moved to bar their trial under Count I on the ground that such trial would violate the rights accorded them by the Double Jeopardy Clause of the Fifth Amendment. Petitioners contended that Count I charged them with the same offense for which they had been tried and acquitted in *United States* v. *Arkansas Fuel Oil Corporation* (C. R. No. 13318, N. D. Okla.)—to wit, a conspiracy in violation of Section 1 of the Sherman Act to fix gasoline prices in, among others, the States of New Jersey, Pennsylvania and Delaware during a portion of the same time period—and that trial under Count I was therefore barred by the Double Jeopardy Clause.

Judge Wortendyke denied the motion (Opinion, Appendix A, pp. A1-A5, *infra*), and on February 28, 1969, an order was entered to that effect (Appendix B, p. A6, *infra*).

Petitioners filed a timely notice of appeal on March 7, 1969, because they believed that Judge Wortendyke erred in not granting their motion to bar trial and that an immediate appeal was the only way in which they could obtain effective appellate review of their claimed constitutional right not to be tried twice for the same offense.

On May 9, 1969, the Government moved to dismiss petitioners' appeals claiming that the order from which the appeals were taken was not a final order and that petitioners must wait until after the trial for the Circuit Court to determine whether the trial itself would deny appellants their fundamental constitutional rights under the Double Jeopardy Clause.

Petitioners opposed the motion and contended that since this Court and other courts have ruled that the protection afforded by the Double Jeopardy Clause was the protection against an accused's being twice placed in jeopardy by a second trial, the order of the District Court must be considered final if effective appellate review was ever to be afforded by the federal judicial system.

The Government's motion to dismiss was granted by the Circuit Court (Freedman, Seitz and Aldisert, C. JJ.) without opinion by an order entered May 23, 1969 (Appendix C, p. A7, *infra*).

REASONS FOR GRANTING THE WRIT

This Court should now review and reverse the decision of the Court of Appeals because it is only now, before being put in jeopardy by a second trial, that petitioners can have effective appellate review of their claim that the trial itself will deprive them of their fundamental constitutional rights under the Double Jeopardy Clause. The decision of the Circuit Court thus raises the important question of federal law as to whether there will be effective appellate review of an accused's right under the Double Jeopardy Clause or whether the determination of that basic right will be left in the sole province of the district courts. This question has not been, but should be, settled by this Court. The decision of the Circuit Court should also be reviewed by this Court because the conclusion reached as to the appealability of the District Court's order is in conflict with the decisions of this Court in cases such as *Cohen* v. *Beneficial Industrial Loan Corp., infra,* and in conflict with the decisions of two other Circuits.

A. The decision of the District Court, if left to stand, will deny any appellate review of an accused's constitutional claim not to be tried twice for the same offense.

The decisions of this Court have long and clearly held that the thrust of the Double Jeopardy Clause is to preclude a second trial for the same offense and not merely to afford a ground for an appellate court to reverse conviction after the second trial for the same offense. *Ex parte Lange,* 18

Wall. 163, 169 (1873); *United States* v. *Ball,* 163 U. S. 662, 669 (1896); *Green* v. *United States,* 355 U. S. 184, 187-88 (1957); *Downum* v. *United States,* 372 U. S. 734, 736 (1963). The Court's position is well summarized in its opinion in *Green* v. *United States*:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In his Commentaries, which greatly influenced the generation that adopted the Constitution, Blackstone recorded:
>
> > " '. . . the plea of *auterfoits acquit,* or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.'[4]
>
> "Substantially the same view was taken by this Court in *Ex parte Lange,* 18 Wall. 163, at 169:
>
> > " 'The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.'[5]
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should

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"[4]. 4 Blackstone's Commentaries 335.

"[5]. And see *United States* v. *Ball,* 163 U. S. 662, 669:
" 'The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.' "

not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (at pp. 187-188)

It would be a sad commentary on the federal appellate system and the Double Jeopardy Clause itself if an accused is compelled to wait until after trial to have reviewed the constitutional question of whether he need stand trial. That is the result of the Circuit Court's decision. It precludes review until the embarrassment, expense, ordeal, anxiety and insecurity, which it is the Double Jeopardy Clause's purpose to prevent, has been worked upon the accused and his right not to be tried twice is made moot. Furthermore, by leaving the question of double jeopardy solely in the province of the district courts, the decision precludes the circuit courts of appeals from fulfilling their intended role of unifying the law developing under the Double Jeopardy Clause.

B. The decision of the Circuit Court conflicts with the decisions of this Court and two of the other Courts of Appeals.

The Government's motion to dismiss the appeals was based on its claim that the appeals were not taken from a final order and were thus not appealable under 28 U. S. C. § 1291. Petitioners assume that was the ground for the Circuit Court's decision. That decision, then, is in conflict with the principles laid down by this Court in such cases as *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) (order denying corporation's right to statutory security from shareholder-plaintiff held appealable before final judgment); *Swift & Company Packers* v. *Compania Colombiana Del Caribe, S. A.*, 339 U. S. 684 (1950)

(order dissolving an order of attachment held appealable before final judgment); *Roberts* v. *United States District Court for the Northern District of California,* 339 U. S. 844 (1950) (order denying motion to proceed *in forma pauperis* held appealable before final judgment); *Stack* v. *Boyle,* 342 U. S. 1 (1951) (order denying motion to reduce bail held appealable before final judgment; see particularly p. 6 and Jackson, J., concurring at p. 12); and *Gillespie* v. *United States Steel Corp.,* 379 U. S. 148 (1964) (order in a Jones Act case striking state claims and claims on behalf of the brothers and sisters of the deceased seamen held appealable before final judgment).

The Circuit Court's decision is also in conflict with decisions by the Court of Appeals for the Second Circuit, *Eisen* v. *Carlisle & Jacquelin,* 370 F. 2d 119 (2 Cir.), *cert. denied* 386 U. S. 1035 (1967) (order denying class action status held appealable before final judgent), *Chabot* v. *National Securities and Research Corp.,* 290 F. 2d 657 (2 Cir. 1961) (order requiring the posting of security by the investor-plaintiffs in accordance with investment advisors contracts held appealable before final judgment), and the Court of Appeals for the Ninth Circuit. *Kyle* v. *United States,* 211 F. 2d 912 (9 Cir. 1954) (order denying motion for speedy trial held appealable before final judgment).

In *Gillespie,* this Court has said "[A] decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie* v. *United States Steel Corp., supra,* at p. 152. The Court has recognized that there is "[A] small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* at p. 546.

In determining whether an order is appealable, a practical rather than a technical construction is to be given to finality:

> "[I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' . . . [I]n deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Gillespie* v. *United States Steel Corp., supra,* at pp. 152-53.

The order here in question denying petitioners' motion to bar trial, although having a far greater impact on a defendant's rights, is the same type of order held reviewable in the above cases. It is collateral to the action itself, which deals with whether or not the defendants have violated the Sherman Act. And here, unlike *Cohen, supra,* where the Court stated that review after trial "will be too late effectively to review the present order, and the rights conferred by the statute if it is applicable, will have been lost, *probably* irreparably" (at p. 546, emphasis supplied), petitioners' constitutional rights *will* have been irreparably lost in the absence of review before trial. Moreover, here the right in question is an explicit constitutional and personal right while in *Cohen* the right was merely based upon a statute and designed to protect only the property of the defendant.

In *Eisen* v. *Carlisle & Jacquelin, supra,* the Court held the order reviewable because its effect, if not reviewed, was the "death knell" of the action. Here, a refusal of review will be the "death knell" of petitioners' constitutional rights not to be tried a second time for the same offense.

The *Cohen* case relies (see 337 U. S. at p. 546) on *Cobbledick* v. *United States,* 309 U. S. 323 (1940), the chief case on which the Government relied below in urging dismissal of the appeals. In *Cobbledick,* the Court did rule that denial of a motion to quash a subpoena *duces tecum* was not a final decision under the predecessor statute to § 1291. But in so ruling, the Court went on to indicate that where a claim of constitutional right is involved, appeal will lie from an order which, if not promptly reviewed, would for all practical purposes deprive the appellant of effective review of his constitutional claim:

> "This analysis of finality is illustrated by *Perlman* v. *United States,* 247 U. S. 7. There, exhibits owned by Perlman and impounded in court during a patent suit were, on motion of the United States attorney, directed to be produced before a grand jury. Perlman petitioned the district court to prohibit this use, invoking a constitutional privilege. This petition was denied and Perlman sought review here. The United States claimed that the action of the district court was 'not final' but merely interlocutory and therefore not reviewable by this Court. We rejected the Government's contention. To have held otherwise would have rendered Perlman 'powerless to avert the mischief of the order . . .' 247 U. S. at 13. Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. Due

regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." [footnotes omitted] *Cobbledick* v. *United States, supra,* at pp. 328-329.

CONCLUSION

If the question of petitioners' constitutional right not to be tried for the same offense is not reviewed before trial, that right will be irretrievably lost. The order appealed from below is thus final. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 19, 1969

APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA —*vs.*— AMERICAN OIL COMPANY, et al., *Defendants.*	Criminal Action No. 153-65

WORTENDYKE, *District Judge:*

The indictment in this case was returned on April 8, 1965. It has been under attack by four separate motions to dismiss. This Court's consent order of December 26, 1967 extended to January 8, 1968 the time within which defendants might file motions addressed to the indictment. The allegations of the indictment were summarized in this Court's opinion filed January 26, 1966, D. C. 249 F. Supp. 799. The offenses charged in the indictment are violations of the Sherman Act, 15 USC §§ 1 and 2. The violation of Section 1 of the Act is charged in the First Count. It alleges an agreement or concert of action by and among the defendants to fix motor vehicle gasoline fuel prices in the three-state area of Delaware, Pennsylvania and New Jersey extending over a period from 1955 to the date of the return of the indictment, thereby effecting a restraint of interstate commerce.

Despite the limitation imposed by this Court's order of December 26, 1967 and the imminence of trial of the indictment, all of the defendants excepting American Oil Company, filed, on January 6, 1969, a motion to dismiss the first

count of the indictment upon the ground that the trial of that count would constitute double jeopardy to the moving defendants by reason of the indictment and trial and their acquittal in United States v. Arkansas Fuel Oil Corporation, Cr. No. 3450, Eastern District, Virginia, which was tried in Tulsa, Oklahoma on February 13, 1960, and is hereinafter referred to as the Tulsa case. The present movants also assert that the Tulsa judgment amounted to res judicata in favor of movants with respect to the offense charged in Count I of the instant indictment. With the notice of the pending motion were filed, by the Court's leave, copies of the following documents: (1) The Tulsa indictment; (2) the bill of particulars relating thereto; and (3) a transcript of the oral opinion of the trial judge expressing the reasons for his grant of the motions of the defendants for direction of verdicts in their favor at the close of the evidence for the prosecution in that case. The present movants rely upon the foregoing documentation to support their burden of proof of the facts upon which they rest their present contentions of double jeopardy and res judicata.

The Tulsa indictment charged twenty-nine producers and distributors of crude oil and motor vehicle fuel gasoline, including all defendants in the present case except American Oil Company, with having conspired to fix the prices of crude oil and automotive gasoline in interstate commerce throughout forty-four states of the United States, including Delaware, Pennsylvania and New Jersey during the period commencing in November, 1956 and effective during the month of January, 1957. More specifically, paragraphs 13 and 14 of the Tulsa indictment allege:

> "13. Beginning at some time in 1956, the exact date being to the grand jurors unknown, and continuing through January 1957, the defendants, and other

persons to the grand jurors unknown, engaged in an unlawful combination and conspiracy to raise, fix, and stabilize the prices of crude oil and automotive gasoline throughout the affected market, in restraint of the aforesaid interstate trade and commerce in crude oil and automotive gasoline and in violation of Section 1 of the Act of Congress of July 2, 1890, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies,' as amended, 26 Stat. 209 (15 USC § 1), commonly known as the Sherman Act.

14. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants, the substantial terms of which were that, during January 1957, for the purpose and with the intent of raising, fixing, and stabilizing the prices of crude oil and automotive gasoline throughout the affected market; (a) each defendant engaged in purchasing crude oil would increase its posted crude oil prices throughout its crude area, and, (b) each defendant engaged in marketing automotive gasoline would increase its automotive gasoline prices throughout its marketing area."

Paragraphs 13 and 14 of the instant indictment allege:

"13. Beginning at least as early as 1955 and continuing up to and including the return date of this indictment, the defendants and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in gasoline, in violation of Section 1

of the Act of Congress of July 2, 1890, as amended (15 U.S.C. Section 1) commonly known as the Sherman Act.

14. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators the substantial term of which has been to raise, fix, stabilize and maintain tank wagon prices and retail prices of gasoline in the trading area."

[1] None of the evidence for the prosecution in the Tulsa case is before the Court on the present motion. Movants contend, however, that the indictment and bill of particulars in that case conclusively disclose that movants were initially jeopardized by the return of the Tulsa indictment and the commencement of trail thereon, and that the direction of verdicts for defendants therein constituted res judicata of the innocence of present movants of the offense charged in Count 1 of the instant indictment. Double jeopardy could not exist until a jury was empanelled and sworn for the trial of the instant indictment. Nevertheless, this Court has considered the pending motion as if the latter trial had actually commenced.

[2-4] The burden of proving double jeopardy and res judicata by a preponderance of the evidence rests upon movants. United States v. Wilson, 32 U.S. 159, 8 L. Ed. 640 (1833); Reid v. United States, 177 F.2d 743 (5 Cir., 1949). Such pleas in bar are sustainable only where the offense involved in both the first and second trials is the same. United States v. Ewell, 383 U. S. 116, 86 S. Ct. 773,

15 L. Ed. 2d 627 (1966); Dryden v. United States, 403 F.2d 1008 (5 Cir., 1968). Offenses are not the same "for purposes of the double jeopardy" clause of the 5th Amendment unless the evidence required to support conviction on one of the indictments would have been sufficient to warrant conviction on the other. Gore v. United States, 357 U. S. 386, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958); Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L. Ed. 1151 (1915); United States v. Bruni, 359 F. 2d 807 (7 Cir., 1966).

[5] The material submitted in support of the pending motion is insufficient to enable the Court to determine whether the offenses respectively charged in the Tulsa and instant indictment would be the same because of the Court's ignorance of the evidence which was presented by the prosecution to support the former. Consequently, its sufficiency to warrant conviction under the latter has not been shown. The Tulsa court held the evidence insufficient to support the indictment in that case. The direction of a verdict there cannot be deemed res judicata here as it has not been shown that the offense charged in the Tulsa indictment is the same as the offense charged in the present indictment. Lawlor v. National Screen Service, 349 U. S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955).

The motion of the defendants other than American Oil Company to dismiss Count I of the indictment in this case is accordingly denied.

An appropriate order so directing may be presented by the Government.

REYNIER J. WORTENDYKE, JR.
United States District Judge

APPENDIX B

Order of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

[SAME TITLE]

ORDER

In accordance with the Opinion of this Court filed February 18, 1969,

IT IS, on this 28th day of February, 1969, ORDERED that the motion filed January 6, 1969 by defendants Atlantic Richfield Company, Cities Service Oil Company, Cities Service Company, Gulf Oil Corporation, Humble Oil & Refining Company, Sinclair Refining Company, and Mobil Oil Corporation to bar trial of said defendants under Count I of the indictment herein, and to dismiss Count I as to each of them, is hereby denied.

/s/ REYNIER J. WORTENDYKE, JR.
U. S. D. J.

The foregoing order is hereby approved as to form.

MILBANK, TWEED, HADLEY & MCCLOY

By /s/ RUSSELL E. BROOKS
Attorneys for defendant
Humble Oil & Refining Company,
on behalf of all moving defendants.

/s/ BERNARD WEHRMANN
Bernard Wehrmann
Attorney for the
United States of America

APPENDIX C

Order of the Court of Appeals Dismissing Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17,854/5/6/7/8

UNITED STATES OF AMERICA

vs.

AMERICAN OIL COMPANY, ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, SOCONY MOBIL OIL COMPANY, INC.

ATLANTIC RICHFIELD COMPANY,
Appellant in No. 17,854

GULF OIL CORPORATION,
Appellant in No. 17,855

HUMBLE OIL & REFINING COMPANY,
Appellant in No. 17,856

SINCLAIR REFINING COMPANY,
Appellant in No. 17,857

SOCONY MOBIL OIL COMPANY, INC.
Appellant in No. 17,858

Present: FREEDMAN, SEITZ and ALDISERT, *Circuit Judges.*

Upon consideration of motion by appellee, United States of America, to dismiss appeals, and appellants' memorandum in opposition thereto, and after hearing, all in the above-entitled cases,

Appendix C

It is ORDERED that the appeals in these cases be, and hereby are dismissed.

By the Court,

FREEDMAN
Circuit Judge

Dated:
May 23, 1969